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No. 07-1059 and 07-1078

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

EURODIF S.A., ET AL.

USEC, INC., ET AL., PETITIONERS

*v.*

EURODIF S.A., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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In the administrative decisions at issue in this case, the Department of Commerce (Commerce) reasonably construed 19 U.S.C. 1673(1) to encompass foreign merchandise that enters the commerce of the United States at prices below fair value, whether the U.S. customer obtains the merchandise in exchange for cash alone or in exchange for a combination of cash and raw materials. The Federal Circuit erred in substituting its own interpretation of Section 1673(1) for the reasonable construction of the expert agency, thereby creating a loophole that encourages evasion of the Nation's fair trade laws

on a matter of substantial concern. That decision should be reversed.

In defending that decision, respondents attack the agency's determination that low enriched uranium (LEU) acquired via separative work unit (SWU) contracts is "sold" within the meaning of Section 1673(1). But in reaching that determination, Commerce reasonably attached primary significance to the economic substance of those transactions, and to the manner in which the enrichment process is actually performed, rather than according dispositive weight to the contracting parties' characterizations of their own arrangements. Respondents' contrary approach, under which Commerce was required to accept conceded legal fictions embodied in the parties' contracts, would undermine the statutory scheme and facilitate evasion of antidumping duties. Commerce reasonably concluded that Congress did not compel that counterintuitive result.

### A. Commerce Reasonably Concluded That LEU Produced Pursuant To SWU Contracts Is "Sold" Within The Meaning Of The Antidumping-Duty Statute

The application of the antidumping-duty law to the circumstances here depends on whether LEU produced under SWU contracts is "foreign merchandise" that "is being, or is likely to be, sold in the United States," 19 U.S.C. 1673(1). Respondents do not appear to dispute that the LEU at issue in this case is "foreign merchandise" within the meaning of Section 1673(1). They contend (Eurodif Br. 21-34; Ad Hoc Utilities Group (AHUG) Br. 23-49), however, that the LEU is not "sold," pointing to definitions of the noun "sale" as a "transfer of ownership of property in exchange for con-

sideration." Eurodif Br. 22. Those definitions, however, do not undercut the agency's determinations.

In concluding that LEU acquired pursuant to SWU transactions is "sold in the United States," Commerce expressly found that the transactions effected a "transfer of ownership" in the relevant merchandise. See, *e.g.*, Pet. App. 131a ("[T]hese sales represent the transfer of ownership in the complete LEU product for consideration."); *id.* at 256a (under SWU contracts, "ownership of the LEU is only transferred to the utility customer upon delivery of the LEU").[1] To demonstrate that Commerce's determination is foreclosed by the "unambiguously expressed intent of Congress," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), it is therefore insufficient for respondents to show that a transfer of ownership is required to trigger the antidumping-duty statute. Respondents must also establish that the concept of "transfer of ownership" *necessarily* includes criteria that their LEU transactions failed to satisfy, so that Commerce acted *unreasonably* in concluding that such a transfer had occurred. Respondents cannot make that showing.

1. Commerce reasonably determined that SWU transactions result in a transfer of ownership of LEU—and thus in LEU being "sold" within the meaning of the antidumping-duty statute—for at least three reasons.

a. From the customer's perspective, a SWU transaction results in a transfer of ownership because the customer obtains merchandise that it did not own at the outset. The customer provides to the manufacturer a quantity of cash and raw materials, and it receives, in

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[1] References in this brief to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 07-1059.

return, a manufactured product that is (as respondents acknowledge, see Eurodif Br. 39), a new article of commerce that is an "entirely different * * * product." Pet. App. 240a. As a factual matter, moreover, the LEU product that a utility receives in a SWU transaction is not produced from the particular feedstock that the utility provided. A SWU transaction therefore results in a transfer, in exchange for payment, of a commodity that the purchaser did not previously own. From the customer's perspective, that would be true even if the enricher delivered LEU produced from the very feedstock the customer had provided. Because the enrichment process fundamentally transforms the feedstock from which it is produced, it results in a new article of commerce that the utility did not own at the outset of the transaction. But the transfer of ownership is particularly clear where, as here, the manufactured product bears no physical relationship to any raw materials the customer could previously have been said to own.[2]

b. Focusing specifically on the SWU contracts and on other record evidence, Commerce found that "utility customers hold title to the natural uranium feedstock that they provide to the enrichers," but that utilities do not have or receive title to the finished LEU immediately upon its production. Pet. App. 132a, 133a; see, *e.g.*,

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[2] Section 1673(1) encompasses merchandise that "is being, or is likely to be, sold in the United States." The statute's use of the passive voice reflects Congress's intent to reach imported merchandise that has been transferred to a domestic customer for consideration. But the threshold determination that particular merchandise has been "sold" does not require precise identification of the seller. Thus, even if respondents could show that enrichers never acquire ownership of LEU or the feedstock from which it is produced, Commerce could nevertheless reasonably conclude that the LEU is "sold in the United States."

Confidential J.A. 17, 333. Rather, Commerce concluded that "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product." Pet. App. 133a. Commerce thus determined that the transfer *to* the customer of title to the LEU that occurs at the time of delivery is a transfer *from* the enricher. Although respondents dispute that proposition, see, *e.g.*, AHUG Br. 40 ("Obviously the enricher cannot convey title to uranium it does not own."), they identify no *other* entity that could plausibly be thought to own the LEU between the completion of the enrichment process and the delivery to the customer.

c. Commerce reasonably concluded that, although the utility contractually retains title to its original feedstock while the enrichment process is ongoing, the enricher rather than the utility exercises the prerogatives that are customarily associated with ownership. The enricher accepts feedstock with no obligation to return any specific lot to any particular customer, but instead treats the feedstock as part of an undifferentiated inventory. Pet. App. 133a. The enricher may draw from that inventory more or less feed uranium than the customer had supplied to produce the customer's desired quantity of LEU. *Id.* at 253a. Indeed, an enricher may satisfy its obligations under a contract by delivering the finished LEU product *before* it ever receives feed uranium from the customer. *Id.* at 133a.

2. Respondents do not dispute Commerce's understanding of the manner in which the enrichment process is actually performed. Rather, they contend that Commerce was required to accept the contracting parties' own characterization of SWU transactions as contracts

for enrichment "services," under which utilities are "deemed" to receive back their original feedstock in enriched form. See, *e.g.*, Eurodif Br. 36-37; AHUG Br. 40-41. That argument is misconceived.

a. In construing other statutory provisions that use the word "sale," this Court has not required that the relevant transfer of ownership be accomplished through a single contract that is expressly denominated by the parties as one for the sale of goods, cf. AHUG Br. 51, or that contains formal provisions for the transfer of title, cf. Eurodif Br. 36. See *e.g.*, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965). Contrary to respondents' contention (Eurodif Br. 24-26; AHUG Br. 28), this Court's willingness to look beyond contractual formalities to economic realities has not been limited to circumstances in which the form of a transaction was designed to circumvent the regulatory scheme in question. Rather, this Court has made clear that its approach does not rest on "impugning in any way the good faith and genuineness of the transactions." *United Gas*, 381 U.S. at 400.

b. The purposes of the antidumping-duty law would be disserved if Commerce were required to give dispositive effect to contracting parties' characterizations of their own transactions—effectively granting parties the option of contracting around the fair trade laws. The statute is not designed to define the rights and obligations of utilities and enrichers (or customers and producers more generally) vis-à-vis each other. Rather, its purpose is to prevent would-be dumpers and their customers from entering into agreements that are mutually beneficial to the contracting parties but that unfairly disadvantage domestic competitors. That purpose would be subverted if Commerce were inflexibly bound

by contractual assertions (*e.g.*, that the LEU a utility receives is "deemed" to have been produced from the utility's own feedstock) that are demonstrably contrary to fact. Respondents contend that "this 'legal fiction' is a contractual and economic reality that defines both the transaction as a whole and the legal rights that flow from it." AHUG Br. 41. But even assuming that the inclusion of a contractual "deeming" provision significantly affects the parties' rights and obligations under *other* bodies of law, the prospect of such consequences did not obligate Commerce to treat the fiction as true for purposes of the antidumping-duty statute.

AHUG's contention (Br. 41) that "this 'legal fiction' * * * is critical to regulation of the entire nuclear fuel cycle" is likewise misplaced. Even assuming that the SWU contracts' title and "deeming" provisions are essential to the orderly implementation of the agreements, nothing in Commerce's determination precludes utilities and enrichers from continuing to rely on those terms. Rather, reversal of the court of appeals' decision would simply mean that SWU contracts are subject to the antidumping-duty law. For similar reasons, the fact that the contracting parties had valid economic motives for structuring their transactions as they did (*e.g.*, Eurodif Br. 6-7; AHUG Br. 10-12), and did not craft the contracts' title and "deeming" provisions in order to evade the antidumping-duty law, does not cast doubt on the validity of Commerce's determination here. In many transactions where the consideration provided by one party is partly in cash and partly in kind (as where a customer provides both money and a used car in exchange for a new vehicle), a valid economic motive exists, but the transaction still results in merchandise being "sold."

c. As amended in 1984, the antidumping-duty law provides that "a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding merchandise that is equivalent to the sale of merchandise." 19 U.S.C. 1673. That provision strongly indicates that application of the statute need not turn on technicalities of title transfer, or on whether the set of transactions culminating in the transfer of merchandise is expressly denominated as a sale by the parties. See Gov't Br. 30-31. As respondents correctly observe (Eurodif Br. 26-27; AHUG Br. 27), the lease provision quoted above does not *compel* the conclusion that Section 1673(1) encompasses the contract-manufacturing transactions at issue in this case. But the statutory directive to consider substance rather than form in evaluating lease transactions strongly suggests that Congress did not intend to *preclude* Commerce from applying the antidumping-duty law to other transactions that are "in effect transfers of ownership." H.R. Rep. No. 725, 98th Cong., 2d Sess. 11 (1984).

d. As a result of SWU transactions, utilities receive finished LEU that bears no necessary relation to any particular feed uranium they have provided to the enricher—that is to say, to any component of the finished product they could be said to have "owned" before the transaction took place. At common law, a transaction with those general contours was generally treated as a "sale." See, *e.g.*, *Sturm* v. *Boker*, 150 U.S. 312, 329-330 (1893); *Powder Co.* v. *Burkhardt*, 97 U.S. 110, 116 (1878); Gov't Br. 48-49.

Respondents contend (Eurodif Br. 41-42; AHUG Br. 44-45) that those early cases distinguishing "bailments" from "sales" are inapposite because the background rule they announced could be superseded by evidence that

the parties to the contract intended a different result. Here, however, Commerce had a sound basis for declining to give decisive effect to the parties' intent—namely, that regulated entities should not be allowed to contract out of the statutory obligations that the antidumping-duty law imposes. See pp. 6-7, *supra*. Commerce thus acted reasonably in concluding that the applicability of the statute does not turn on whether the parties to the relevant contract themselves characterized their transaction as a "sale of merchandise." Having permissibly determined that the parties' characterization should not control, Commerce also acted reasonably in giving weight to a factor that the common law treated as decisive in cases where the parties' intent was unknown.

3. Respondents contend that "[t]he price term in [the] SWU contracts underscores that only enrichment services are sold" because "[t]he contracts do not contain any price term covering uranium." Eurodif Br. 37; see AHUG Br. 41-42. But when respondents refer to the "price term" of the contract, what they mean is the *cash* price term. Under a SWU contract, the consideration that a utility must provide in order to receive a specified quantity and assay of LEU consists not only of cash, but also of the feedstock that utilities must provide as part of the bargained-for exchange. As Commerce explained, "the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher." Pet. App. 128a n.34.

Respondents argue that the feedstock provided by utilities under SWU contracts cannot be considered a component of the price of LEU because the contracting parties do not regard that feedstock as "a form of payment." Eurodif Br. 43 n.21; see AHUG Br. 42. Com-

merce recognized that "the provision of uranium feedstock may not be a payment-in-kind *in the formal sense under these contracts*." Pet. App. 254a (emphasis added). Contrary to Eurodif's contention (Br. 43 n.21), however, Commerce did not thereby reject the proposition that feedstock is *in fact* part of the consideration that a utility provides under a SWU contract. Rather, Commerce simply acknowledged that the contract does not describe it as such. As with the contractual provision "deeming" the LEU a utility receives to have been produced with the utility's feedstock, Commerce declined to treat as dispositive the formalities of the parties' agreement. Pet. App. 254a-255a. Looking "beyond the four corners of the contract" to the "totality of circumstances surrounding the transactions," Commerce reasonably concluded that "the overall arrangement under [SWU contracts] is, in effect, an arrangement for the purchase and sale of LEU," and not only the "service" of producing LEU. *Ibid.*

In practical terms, the feedstock provided under a SWU contract is naturally regarded as part of the consideration or "price" paid for the LEU. The amount of cash a utility must provide to obtain a given quantity and assay of LEU will vary depending upon the amount of feedstock the utility provides.[3] And because the enricher controls how much feed to use, and how much enrichment to perform, the cash paid by the utility may

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[3] By the same token, a utility seeking to acquire a given quantity and assay of LEU would be required to pay more cash in an enriched uranium product (EUP) contract than in a SWU contract, even though the utility would receive the same merchandise in the end. The obvious explanation for that disparity is that cash is the *only* consideration the utility gives in an EUP contract, whereas it provides additional consideration in a SWU contract.

not equal the negotiated value of the enrichment processing actually performed by the enricher, just as the value of the feed the utility provides may not equal the value of the feed the enricher actually uses to produce LEU. Eurodif's statement (Br. 43 n.21) that "[t]he feed is not a form of payment, but a raw material in need of processing," rests on a false dichotomy. Although the feedstock is unquestionably a raw material essential to the production of LEU, that does not prevent it from *also* being an element of the price. To the contrary, precisely because the feedstock is essential to the production of LEU, it has obvious value to the enricher, since it obviates the enricher's need to obtain from another source feed uranium to replenish its inventory.

4. For substantially the same reasons, respondents are wrong in arguing (Eurodif Br. 48-50; AHUG Br. 29 & n.21, 42-43) that Commerce's calculation of the dumping margin in this case casts doubt on the agency's imposition of antidumping duties. Consistent with its determination that SWU transactions represent a transfer of the complete LEU product for a price, Commerce calculated the dumping margin in this case by comparing the total price of LEU, in both cash and feedstock, to the normal value of LEU sold in the home market. See Pet. App. 257a. Respondents object to the agency's calculation methodology on the ground that Commerce used the same estimated value for natural uranium on both sides of the equation, and thereby "eliminat[ed] the estimated uranium value from the dumping determination entirely." AHUG Br. 43. But it does not follow that, as respondents contend, Commerce effectively treated the cash price of enrichment services as "the price for the LEU as a whole," *ibid.*, and thereby violated the statutory command to calculate a dumping

margin for "merchandise." Respondents may disagree with the manner in which Commerce calculated the non-cash price of LEU in SWU transactions, but that disagreement is logically distinct from the broad claim that it is categorically unreasonable for Commerce to consider the non-cash price of merchandise in determining whether it is "sold" for purposes of Section 1673. The question whether Commerce properly valued the non-cash component of the price of LEU produced pursuant to SWU transactions is not at issue in this case.

5. Respondents contend (Eurodif Br. 30, 44-45; AHUG Br. 39 n.28) that Commerce's decision is inconsistent with lower-court cases in which the government has successfully argued, based on many of the same contractual features that respondents highlight here, that SWU contracts are not "contract[s] * * * for * * * the disposal of personal property" under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 602(a), see *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364 (Fed. Cir. 2002), or "contracts for the sale of goods" for purposes of the Uniform Commercial Code (UCC), *Barsebäck Kraft AB* v. *United States*, 36 Fed. Cl. 691, 705 (1996), aff'd, 121 F.3d 1475 (Fed. Cir. 1997); accord *Centerior Serv. Co.* v. *United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997). That argument lacks merit.

Unlike the provisions at issue in those cases, the antidumping-duty statute does not apply to *contracts*; it applies to *merchandise* that is being, or is likely to be, sold at unfair prices in the United States. And also unlike those statutes, the antidumping-duty law does not define, or provide a mechanism to resolve disputes concerning, the rights and obligations of contracting parties *with respect to one another*. The form of the contracting

parties' agreement is logically a paramount consideration in settling a dispute concerning their respective contractual rights and obligations. But it must necessarily carry less weight where, as here, the purpose of the statute is to remedy the adverse effects on third parties of bargains that are mutually beneficial to the signatories. See pp. 6-7, *supra*.

Moreover, even in the contract-dispute context, the court of appeals in *Florida Power & Light* acknowledged that SWU contracts do "not fall neatly" on either side of the line that divides contracts for services from contracts for goods. See 307 F.3d at 1373. That the court regarded that question as close suggests that a contrary conclusion would not have been unreasonable. It follows that Commerce acted permissibly in finding a sale of merchandise in this case, based on the language of a different statute with different purposes.

6. Eurodif suggests (Br. 30) that the antidumping-duty statute should be read *in pari materia* with the Robinson-Patman Act, which forbids price discrimination when "commodities are sold * * * within the United States." 15 U.S.C. 13(a). Contrary to respondent's characterization, however, cases decided under the Robinson-Patman Act have not categorically held that "processing operations are service transactions outside the scope of the [Act]." Eurodif Br. 30. Rather, acknowledging that "the distinction between goods and services is not always clear," and that "[m]any transactions are of a hybrid nature, contemplating both goods and services," the courts have asked whether the "dominant nature" of the transaction is the performance of a service or the delivery of a commodity. *First Comics, Inc.* v. *World Color Press, Inc.*, 884 F.2d 1033, 1035 (7th Cir. 1989), cert. denied, 493 U.S. 1075 (1990). Respon-

dent does not contend that all statutory references to sales of commodities unambiguously call for application of a similar "dominant nature" test, and thus preclude expert agencies, such as Commerce, from formulating a different test in a manner consistent with the relevant statutory scheme.

### B. Commerce's Now-Repealed Tolling Regulation And Prior Decisions Do Not Invalidate Its Determination In This Case

Respondents place heavy reliance on Commerce's recently withdrawn regulation concerning the proper calculation of antidumping duties in cases involving so-called "tolling," or subcontracting, operations, and the language of decisions interpreting that regulation. Eurodif Br. 32-34, 51-52; AHUG Br. 32-39; see 19 C.F.R. 351.401(h) (2007), withdrawn by 73 Fed. Reg. 16,517 (2008). They contend that Commerce's past practice under the tolling regulation compels a finding that the kind of contract-manufacturing transactions at issue in this case are beyond the reach of the antidumping-duty law. That argument lacks merit.

1. As the government explained in its opening brief (at 39-44), the tolling regulation, when it was in effect, did not purport to interpret Section 1673's threshold criteria for determining whether merchandise is "sold in the United States" and is therefore subject to the antidumping-duty statute. The regulation focused instead on Commerce's calculation of the export price, constructed export price, and normal value of subject merchandise under Sections 1677a and 1677b. See 19 C.F.R. 351.401(a). Under those provisions, Commerce must generally begin to calculate a dumping margin by identifying "the price at which the subject merchan-

dise is first sold * * * by the producer or exporter of the subject merchandise." 19 U.S.C. 1677a(a) (defining "export price"); see 19 U.S.C. 1677a(b) (defining "constructed export price"). The terms "producer" and "exporter" are not defined in the statute. Cf. 19 U.S.C. 1677(28) (defining the term "exporter or producer" as "the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate"). Where multiple parties could plausibly be thought to fill the role of producer and/or exporter, Commerce has discretion to select among them.

Commerce initially treated so-called "toll-manufacturers"—entities that produced merchandise pursuant to subcontracting, or "toll," arrangements—as "producers" for purposes of Section 1677a and 1677b, and calculated dumping margins based on the fees they charged. See Pet. App. 127a-128a (citing decisions). Commerce subsequently adopted the policy embodied in the tolling regulation. That regulation provided that Commerce would "not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise," 19 C.F.R. 351.401(h) (2007), and thus would not use the price set by the toller to calculate the dumping margin for subject merchandise. Because the regulation addressed the distinct question of dumping-margin calculations, it did not, as the Court of International Trade (CIT) itself recognized, "provide a basis to exclude merchandise from the scope of an antidumping investigation," Pet. App. 191a (citation omitted), and Commerce has never applied the regulation to reach such a result, *id.* at 235a.

2. Respondents contend (Eurodif Br. 33-34; AHUG Br. 34 n.23) that the tolling regulation is nevertheless

relevant to the question presented here because the same logic that led Commerce to determine that certain tollees do not make the "relevant sale" of subject merchandise for purposes of calculating the dumping margin should also have led Commerce to conclude that toll-produced merchandise is not "sold" at all. According to respondents, Commerce has, in one decision, made precisely that connection, stating that "a subcontractor's or toller's price does not represent all elements of value," and that, where the contractor "already owns an essential portion of the product," Commerce "do[es] not consider the 'sale' between the subcontractor and such contractor to be a sale of subject merchandise at all." Response to Court Remand at 5, *Taiwan Semiconductor Mfg. Co.* v. *United States*, 143 F. Supp. 2d. 958 (Ct. Int'l Trade 2001) <http://ia.ita.doc.gov/remands/00-48.htm> (*Taiwan Semiconductor Remand Response*) (emphasis omitted).

The question in *Taiwan Semiconductor*, however, as in Commerce's other determinations applying the tolling regulation, was not whether merchandise had been "sold" within the meaning of Section 1673(1), but rather how to calculate the dumping margin. *Ibid.*; see Pet. App. 235a-236a. And in answering that question, Commerce did not conclude that the toller was automatically disqualified from consideration as the "producer" of the merchandise, but instead conducted an inquiry into the relative roles of the parties in the manufacturing and sales process, and determined that the tollee, which owned and controlled the proprietary design for static random access memory semiconductors, played a more significant role than the foundry that produced the wafers according to the tollee's design, and therefore made the most significant contribution to the dumping

margin. See *Taiwan Semiconductor Remand Response* at 5.

Furthermore, as Commerce recognized in its determination in this case, the dicta in *Taiwan Semiconductor* rested on a false premise. While a toller's "*cash* price * * * may reflect less than 100 percent of the value" of the merchandise, Pet. App. 129a (emphasis added), toll transactions may nevertheless reflect "the full value" of the merchandise where, as here, the bargained-for exchange contemplates the provision of both cash and a quantity of raw materials, see *id.* at 128a n.34, 130a-131a. To the extent the decisions suggested that the transaction between toller and tollee could *never* result in a relevant sale for purposes of calculating the dumping margin, simply because the cash price under the transaction reflected less than the full value of the merchandise, Commerce in this case reasonably determined that such a result would frustrate the purpose of the regulation and of the antidumping-duty statute in a situation where, as here, the tollee does not sell the toll-produced merchandise. *Id.* at 124a, 128a-129a, 157a-158a. Commerce accordingly calculated the dumping margin in this case "by combining the price of the enrichment component with the value of the natural uranium feed component to obtain the full value of the subject merchandise sold to U.S. utility companies." *Id.* at 130a-131a.

3. Even if the tolling regulation and prior administrative decisions were relevant to the issue in this case, they would not support respondents' position here. By its terms, the tolling regulation applied only when the tollers neither acquired ownership nor controlled the relevant sale of the subject merchandise. 19 C.F.R. 351.401(h) (2007). Commerce found, based on the total-

ity of the circumstances, that neither condition is present here because the enricher both owns the LEU it produces and controls the relevant sale. See Pet. App. 126a. And although the CIT rejected Commerce's conclusion as inconsistent with past decisions concerning various other types of tolling arrangements, see *id.* at 50a-56a, 188a-207a, the tollers in those arrangements did not exert the type of control over the production process that enrichers exert in the course of SWU transactions. See *id.* at 137a-145a.[4]

### C. Commerce's Determination Gives Effect To The Antidumping-Duty Statute's Intended Scope

Commerce's decision in this case serves important statutory objectives and represents a "reasonable policy choice" that warrants deference from a reviewing court. See *Chevron*, 467 U.S. at 845.

1. As the government explained in its opening brief (at 34-39), Commerce's decision in this case ensures that foreign manufacturers and domestic producers cannot contract around the Nation's fair trade laws. Respondents contend (Eurodif Br. 53; AHUG Br. 49) that the government's concerns about evasion are overstated. In respondents' view, the effect of the decision below is limited by the unique circumstance that the merchandise in question is consumed by the domestic customer

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[4] Respondents contend that Commerce's decision to withdraw its tolling regulation represents an "irrational departure" from its prior policy. Eurodif Br. 33 (quoting *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996)); see AHUG Br. 37. It was wholly rational, however, for Commerce to withdraw a regulation that had been interpreted, by a court that has exclusive jurisdiction to review the agency's determinations, to compel a result that the agency did not intend and does not regard as consistent with the objectives of the statute. See 73 Fed. Reg. at 16,517 (explaining Commerce's withdrawal of the tolling regulation).

rather than resold in tangible form. According to respondents, Commerce can always impose antidumping duties on those subsequent sales; it is "[o]nly goods that are never sold, and therefore cannot be dumped," that are "outside the scope of the antidumping law." AHUG Br. 49.

Respondents' attempts to minimize the government's legitimate concerns are unavailing. As an initial matter, even if the loophole were limited in the manner that respondents suggest, the circumstances of this case are scarcely unique. Respondents offer no reason to think that it is rare that imported merchandise is, for example, consumed or utilized in the buyer's operations, rather than resold in some tangible form (*i.e.*, in a form other than electricity).

As a practical matter, if foreign merchandise is excluded from the scope of an antidumping-duty order, as were the LEU imports at issue in this case, see Pet. App. 3a, Customs does not suspend liquidation of the entry documents, nor does it collect deposits of antidumping duties. 19 U.S.C. 1673b(d)(1)(B) and (d)(2). There is no mechanism for Customs to collect antidumping duties in the event that non-subject merchandise is eventually resold in some fashion after it enters the United States.

Moreover, if foreign merchandise that is not subject to the antidumping-duty law when imported is incorporated into other items of merchandise, and that new merchandise is later sold in a downstream transaction, it is far from clear that Commerce would have the statutory authority to capture lost antidumping duties by treating the sale of the new product as though it were a sale of the imported merchandise alone. To do so would involve substantial practical difficulties. Although re-

spondents suggest that Commerce could rely on Section 1677a(d)(2), which permits Commerce to subtract "the cost of any further manufacture or assembly" when calculating a constructed export price, such an approach would mean that Commerce would have to attempt, for example, to derive the price of imported steel based on the price of a car. Recognizing the practical difficulties associated with such an approach, Congress created a "[s]pecial rule" that allows Commerce to calculate the constructed export price of imported merchandise to which substantial value is added by, *inter alia*, looking to the price of other subject merchandise sold by the producer or exporter, or "on any other reasonable basis." 19 U.S.C. 1677a(e). That rule, however, by its terms applies only to transactions involving affiliated parties. *Ibid.* The approach respondents propose would require Commerce to undertake its dumping calculations based on transactions between unaffiliated parties, and thus without the benefit of the special rule. There is no reason to think that Congress intended that result.

Respondents also suggest (Eurodif Br. 52; AHUG Br. 53) that Commerce can avoid willful evasion of the antidumping-duty laws by enforcing the anti-circumvention provisions of 19 U.S.C. 1677j. Section 1677j enables Commerce to address certain *forms* of circumvention. For example, it permits Commerce to include within the scope of an antidumping order any foreign parts or components that may be assembled in the United States to produce merchandise of the same kind or class as foreign merchandise that is subject to an antidumping-duty order. See 19 U.S.C. 1677j(a). But it does not provide general authority for Commerce to address any and all forms of "strategic circumvention of antidumping restrictions." Eurodif Br. 52. Nor does it forbid parties

from redrafting their contracts and restructuring their sales, even for the specific purpose of "evad[ing] the law." Cf. AHUG Br. 53.

2. The prospect of evasion of the fair trade laws is, as the government has previously explained, see Gov't Pet. 25-31; Gov't Br. 37-39, a matter of considerable concern, particularly in the sensitive context of trade in enriched uranium. After our opening brief was filed, Congress passed, and the President signed into law, legislation that addresses imports of LEU from Russia through 2020. See Department of Defense Appropriations Act, 2008, Pub. L. No. 110-329, Div. C, § 8118, 122 Stat. 3647 (to be codified at 42 U.S.C. 3112A). That law provides incentives for the Russian Federation to continue full implementation of its 1993 agreement with the United States to downblend weapons-grade uranium into LEU for purposes of generating electricity, and to continue to downblend such uranium after the expiration of the HEU Agreement in 2013, by imposing import quotas on LEU (including LEU obtained under SWU contracts) through 2020 that are independent of the quotas established in Commerce's order suspending an antidumping investigation into imports of Russian LEU. *Ibid.*; see Agreement Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons (HEU Agreement), Feb. 18, 1993, U.S.-Russian Fed'n, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921; cf. *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,235 (Dep't of Commerce 1992) (notice of suspension of investigations and amendment of preliminary determinations).

The legislation thus responds to one of the most significant implications of the decision below: the potential

for undermining full implementation of the HEU Agreement, a key element of this Nation's nonproliferation policy. It remains the case, however, that the proper application of this Nation's fair trade laws generally, and their application to trade in enriched uranium in particular, is a matter of considerable importance. As the government explained in its petition for a writ of certiorari (at 30-31), the United States relies on the availability of domestic sources of enriched uranium for certain military purposes, including the production of tritium, a radioactive isotope necessary to maintain the United States' nuclear arsenal, and as a prospective source of fuel for the Navy's nuclear-powered submarines and aircraft carriers. Unchecked by the fair trade laws, unfairly priced imports would threaten the viability of the domestic enrichment industry, and thus the United States' ability to acquire materials critical to military operations.

Respondents suggest (Eurodif Br. 54-55; AHUG Br. 54-58) that the government already has a sufficient "stockpile" of enriched uranium, can "recycl[e]" the materials it already has, and could, if necessary, undertake to operate USEC's enrichment facilities itself. Respondents, like the courts, are particularly ill-positioned to make such assessments. And, in any event, respondents are incorrect. The availability of sources to replenish the United States' supply of essential nuclear materials is a matter of considerable concern, and the ramifications of responding to that concern by undertaking to renationalize USEC's operations are scarcely inconsequential.

3. Eurodif and respondents' amicus contend that a reversal of the court of appeals' decision would conflict with the United States' obligations under the General

Agreement on Tariffs and Trade 1994 (GATT), 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1339 (1994), and the Agreement on Implementation of Article VI of the GATT (Antidumping Agreement), 1 H.R. Doc. No. 316, *supra*, at 1453, because those agreements do not permit imposition of antidumping duties on services or processes alone. See Eurodif Br. 57; Bhala Amicus Br. 11. That contention is not properly before the Court. Under the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.*), "[n]o provision of the [GATT or the Antidumping Agreement], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect," 19 U.S.C. 3512(a)(1), and "[n]o person other than the United States * * * may challenge * * * any action or inaction by any department, agency, or other instrumentality * * * on the ground that such action or inaction is inconsistent with such agreement," 19 U.S.C. 3512(c)(1). Thus, "[n]either the GATT nor any enabling international agreement outlining compliance therewith" can "trump[] domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress." *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005), cert. denied, 546 U.S. 1089 (2006).

In any event, respondents and their amicus do not explain how the international obligations they identify bear on the proper analysis in this case. Much like Section 1673, GATT and the Antidumping Agreement address the sale of goods, but provide no specific guidance for determining whether merchandise produced and transferred pursuant to SWU-type arrangements is "sold." Respondents' concern that reversal of the court

of appeals' decision will bring the United States into conflict with its international obligations is unfounded and provides no basis for sustaining the misguided decision below.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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